(1) 89-415

Supreme Court, U.S.
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SEP 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LESLIE H. BROOKS, JR. Appellant

vs.

COMMOMWEALTH OF VIRGINIA Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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25pp

QUESTIONS PRESENTED

I

Does the Fifth and Fourteenth Amendments to the United States Constitution require the Town of Ashland to have its drunk driving ordinance properly enacted into law, the fact that said ordinance has been enacted into law?

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OPINIONS BELOW

The Orders of the Supreme Court of Virginia and the Court of Appeals of Virginia appear in the Appendix.

JURISDICTION

This Court's jurisdiction is invoked under 28 USCA Section 2101 (c) (d) and Rule 11, Rules of the Supreme Court of the United States.

STATE CONSTITUTION

Article VII, Section 7, Constitution of Virginia:

"No ordinance or resolution appropriating money exceeding the sum of five hundred

dollars, imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body. In case of the veto of such an ordinance or resolution, where the power of veto exists, it shall require for passage theereafter a recorded affirmative vote of two thirds of all members elected to the governing body.

On final vote on any ordinance or resolution, the name of each member voting and how he voted shall be recorded."

STATE CODE

Section 15.1-828 of the Code of Virginia, as Amended:

"Journal of Counsil. - A journal shall be kept of the council's proceedings and at the request of any member present the yeas and nays shall be recorded on any question. At

the next meeting the proceedings shall be read and signed by the person who was presiding when the previous meeting adjourned or, if he be not then present, by the person presiding when they were read. (Code 1950, Section 15-4211 1962, c. 623)"

STATEMENT OF THE CASE, FACTS, AND REASONS FOR GRANTING THE APPEAL

Leslie H. Brooks, Jr. was convicted on November 3, 1986, of driving under the influence. Although several issues were previously assigned as error, he brings before this Court one question for the Court's consideration.

Brooks, at a pretrial hearing, produced the testimony of Patrick R. Bynum, the Attorney for the Town of Ashland. Mr. Bynum testified that the Town of Ashland had by motion at its July 1985 meeting, by verbal

vote, after following all statutory requirements up to and including the time of the vote, re-adopted Section 10-1. He stated that he could not find any written records existing showing that the Town Clerk had signed the 1985 adoption of the ordinance into law, or the minutes of the July meeting, but stated that it was signed into law and that there were minutes of the July meeting.

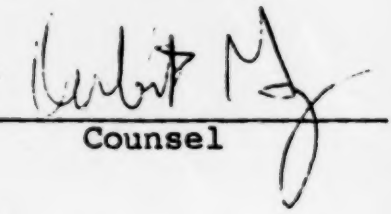
Brooks argues that Va. Code 15.1 - 828 and Article VII, Section 7 of the Constitution of Virginia, and the Fifth and Fourteenth Amendments mandate that there be written records on file properly documenting the enactment of Town Code 10-1. His conviction must be set aside. Natural Gas v. Norphlet, 294 S.W. 52; Rowe v. Reese, 91 S.E. 880; Sutton v. Mentzer, 134 N.W. 108; Olin v. Meyers, 7 N.W. 509; De Ridder v. Head, 72 S.W. 434; O'Neil v. Tyler, 53 N.W. 434;

Delphi v. Evans, 36 Ind. 90; Bruder v. Board of Education, 224 N.W. 268; Valentine v. Valentine Motel Inc., 125 N.W. 2d 98; Milwaukee v. Milwaukee Electric R. & Light Co., 129 N.W. 623; Quaglia v. Munsey Park, 389 NYS 2d 616; Whitney v. Port Huron, 50 N.W. 316; Albuquerque v. Water Supply Co., 174 P. 217; Osbourne v. McAllen, 91 S.W. 2d 688; United States v. Butler, 297 U.S. 1; Adkins v. Children's Hospital, 261 U.S. 525; McCray v. U.S., 195 U.S. 27; Cooper v. Aaron, 358 U.S. 1; Sterling v. Constantin, 287 U.S. 378.

CONCLUSION

An appeal should be granted in this case.

LESLIE H. BROOKS

By 
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APPENDIX

APPENDIX A

VIRGINIA: -

IN THE CIRCUIT COURT FOR THE COUNTY OF HANOVER, HELD ON NOVEMBER 3, 1986. CASE NO. 244 - 86.

Present: Honorable Richard Taylor, Judge

TOWN OF ASHLAND

v. Upon an Appeal, to-wit: DUI (2nd)

LESLIE H. BROOKS, JR.

ORDER

This day came the Attorney for the Commonwealth, and the defendant, in person and by his attorney, Robert Ganey.

Prior to arraignment, the Court heard evidence and argument of counsel on a Motion to Dismiss, which motion was overruled by the Court.

Whereupon, the accused was arraigned, and pleaded Not Guilty to Driving Under the

Influence - second offense, Ashland Town Code 10-1, as charged in the Warrant.

And after being advised by the Court of right to trial by jury, the accused knowingly and voluntarily waived trial by a jury, and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without a jury, and having heard the evidence and argument of counsel, finds the accused GUILTY of Driving Under the Influence, Ashland Town Code, Section 10-1, as charged in the Warrant.

The Court Adjudges and Orders that the defendant be sentenced to jail for thirty (30) days, his motor vehicle operator's license is suspended for three (3) years, and he is fined the sum of $500.00 and $46.00 costs.

The Court having been advised that the

defendant was going to perfect and appeal, the above sentence is suspended pending appeal.

The defendant is allowed to continue on bond.

ENTER: /s/Richard Taylor,
Judge

A Copy, Teste

Richard L. Shelton, Clerk

/s/ Judith M. Tomes, Deputy Clerk

APPENDIX B

VIRGINIA: -

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

COMMONWEALTH OF VIRGINIA

v.

LESLIE H. BROOKS, JR.

STATEMENT OF FACTS

On November 3, 1986, came the defendant, and his counsel and the Commonwealth by counsel, on the defendant's motion to dismiss the charge of driving under the influence (a second offense) (Section 10-1 of Ashland Town Code).

The Court heard the argument of counsel that the defendant's prior Hanover County warrant conviction of driving under the influence (offense date 12/05/82) should not

to be used against him because this conviction was based on the Hanover County Code Section 15-2. The defendant argued that the case of Mitchell v. County of Hanover, 1 Va. App. 486, precluded the Commonwealth from using the conviction against him.

The Commonwealth argued that the Court had recently ruled in another case that the defendant's argument should be overruled. The Commonwealth argued that the Hanover County Code Section 15-2. was properly enacted pursuant to the Virginia Code Section 15.1--37.3, July 1, 1982, and that the proper enacting statute was not presented in argument to the Virginia Court of Appeals, and thus, not considered. Additional arguments were made by the Commonwealth which included citations of Supreme Court Rule 3A.6, Va. Code Section 19.2-220, and then arguing improper

collateral attack based on those citations since the only difference between the State statute and the County statute were the words "County of Hanover". There was never any appeal.

The defendant additionally argued that Section 10-1 of the Ashland Town Code is without legal effect because it is vague and it had not adopted the Virginia Code as amended.

The defendant produced the testimony of Patrick R. Bynum, the Attorney for the Town of Ashland. Mr. Bynum testified that the Town of Ashland had by motion at its July 1985 meeting, by verbal vote, after following all statutory requirements up to, and including, the time of the vote, re-adopted Section 10-1. He stated that he could not find any written records existing showing that the Town Clerk

had signed the 1985 adoption of the ordinance into law, or the minutes of the July meeting, but stated that it was signed into law and that there were minutes of the July meeting.

The defendant argued that the statute was vague and had not adopted amendments in the breath test statute as required by law, and the Commonwealth argued, in arguendo, that there was no detriment to the defendant as any possible changes to the State Code were followed by Hanover County anyway, as well as again there being an improper collateral attack. There was no appeal.

The Court found the defendant guilty. The Court directed that a Ashland Town Code be made a part of the record.

ENTER: /s/Richard Taylor,
Judge

/s/Robert S. Ganey, Counsel for Defendant
/s/Douglas A. Barry,
Asst. Commonwealth's Attorney

App. 9

VIRGINIA:

IN THE COURT OF APPEALS OF VIRGINIA ON MONDAY THE 12TH DAY OF SEPTEMBER, 1988.

LESLIE H. BROOKS, JR., APPELLANT,

against Record No. 1427-86-2
Circuit Court No. 244-86

TOWN OF ASHLAND, APPELLEE.

Upon an appeal from a judgment rendered by the Circuit Court of Hanover County on the 3rd day of November, 1986.

Before Judges Benton, Duff anmd Cole

The appellant, Leslie H. Brooks, Jr., was convicted of a second offense of driving under the influence in violation of Ashland Code Section 10-1. On appeal, he raises two issues: (1) whether the trial court erred in refusing to grant his motion to dismiss the DUI warrant on the grounds that Ashland Code Section 10-1 was not properly enacted into law; and (2) whether the trial court erred in admitting into evidence a record of his

December 5, 1982, DUI conviction because the ordinance under which he was convicted was later declared invalid in Mitchell v. County of Hanover, 1 Va. App. 488, 340 S.E. 2d 173 (1986).

Upon our review of the record presented to us in this case, and upon the briefs and arguments of counsel, we find sufficient evidence to support the decision of the trial court. We further find that the trial court did not err in admitting into evidence a record of the December 5, 1982, DUI conviction of Brooks. Accordingly, we affirm the decision of the trial court.

This order shall be certified to the trial court.

A Copy, Teste

David B. Beach, Clerk

/s/Deputy Clerk

App. 11

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON MONDAY THE 17TH DAY OF APRIL, 1989.

LESLIE H. BROOKS, JR., Appellant,

against Record No. 881273
Court of Appeals No. 1427-86-2

TOWN OF ASHLAND, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy, Teste

David B. Beach, Clerk

/s/ Deputy Clerk

App. 12

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON FRIDAY THE 9TH DAY OF JUNE, 1989.

LESLIE H. BROOKS, JR., Appellant,

against Record No. 881273
Court of Appeals No. 1427-86-2

TOWN OF ASHLAND, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 17th day of April, 1989 and grant a rehearing thereof, the prayer of said petition is denied.

A Copy, Teste

/s/David A. Beach, Clerk

App. 13

VIRGINIA:

IN THE SUPREME COURT

LESLIE H. BROOKS, JR., Appellant,

against Record No. 881273
Court of Appeals No. 1427-86-2

TOWN OF ASHLAND, Appellee.

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

Leslie H. Brooks, Jr., gives notice of appeal to the United States Supreme Court of the Court's Order of June 9, 1989.

LESLIE H. BROOKS, JR.,

/s/Robert S. Ganey
Counsel

Certificate

I hereby certify that a copy of this notice was delivered this 5th day of September to Mr. Douglas A. Barry, counsel for the Town of Ashland. P.O. Box 470, Hanover, Va. 23069.

/s/Robert S. Ganey

App. 14

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON TUESDAY, THE 25TH DAY OF JULY, 1989.

LESLIE H. BROOKS, JR., Appellant,

against Record No. 881273
Court of Appeals No. 1427-86-2

TOWN OF ASHLAND, Appellee.

ORDER DEFERRING ISSUANCE OF MANDATE

Upon consideration of the motion of the appellant, by counsel, it is ordered that issuance of the mandate in this case be and the same hereby is deferred, to and including the 7th day of September, 1989, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance thereof shall be deferred until the final determination of the case by that Court.

App. 15

A Copy, Teste

/s/David A. Beach, Clerk